

National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: June 7, 1996

TO: Gerard P. Fleischut, Acting Regional Director, Region 15

FROM: Barry J. Kearney, Associate General Counsel, Division of Advice

SUBJECT: South Alabama Electric Co., Case 15-CA-13757, Instrument Technical Services, Inc., Case 15-CA-13758, Kitchens Electric Co., Inc., Case 15-CA-13761

177-7067-6700, 524-5079-8600

These cases were submitted for advice on whether further proceedings are warranted against three employers for allegedly failing to reinstate the same striking employee after that employee allegedly had gone out on a separate strike against each employer.

South Alabama Electric (South)

On May 3, 1995, South hired unpaid Union organizer Rodgers as an electrician helper. On May 4 and 5, South allegedly interrogated Rodgers about his Union affiliation; Rodgers never filed any charges against these unlawful interrogations. Instead, over two weeks later on May 24, Rodgers gave South a letter from the Union stating that Rodgers was going out on an unfair labor practice strike with another employee McKee. McKee earlier had applied for work with South but had not been hired. Rodgers and McKee picketed South for around 30 minutes on May 24, telling South that the Union was picketing to protest South's alleged refusal to hire Union employees. ⁽¹⁾ South did not hear from Rodgers for 10 months until, on March 1, 1996, Rodgers offered unconditionally to return to work. There is no evidence that South had any work for Rodgers at that time.

Instrument Technical Services (ITS)

ITS hired Rodgers on August 1, 1995 as an electrical helper. Rodgers' employment application indicated his Union membership and Rodgers later wore a Union shirt to work. Four days later on August 5, Rodgers and another ITS employee Grow announced that they were going out on an unfair labor practice strike and immediately left the job site. Over two weeks later on August 24, Rodgers and another individual picketed ITS for around one hour. ⁽²⁾ ITS did not hear from Rodgers for five months until, on March 1, 1996, Rodgers offered unconditionally to return to work. ITS responded that it was not hiring any electricians or helpers at that time. Although it appears that ITS did hire two electricians on March 5 and 6, ITS hired no electrician helpers at this time. Neither Rodgers nor the Union filed any other relevant Board charges against ITS.

Kitchens Electric (Kitchens)

Kitchens hired Rodgers as a journeyman electrician on August 10, 1995. Rodgers' employment application indicated his Union membership and Rodgers wore a Union shirt to work every day. On August 16, during his lunch break, Rodgers handbilled at the job site with language protesting Kitchens' payment of non-union substandard wages. Kitchens told Rodgers that he had "caused a lot of trouble" by his handbilling and transferred Rodgers to another job site on that day. On August 24, Rodgers went on strike advising Kitchens that he was protesting the discharge of another employee New. Rodgers admits, however, that he did not know the reason for New's discharge. Neither Rodgers nor New picketed or engaged in any other strike activity at that time.

Around two weeks later on September 5, Rodgers arrived at Kitchens with employee New, whom Kitchens had called back to work. Kitchens also "rehired" Rodgers at this time. Rodgers asked Kitchens for more money and, when Kitchens refused,

Rodgers and New announced that they were going out on an economic strike. Neither employee engaged in any picketing or other activity after leaving Kitchens that day. Kitchens did not hear from Rodgers for around 5 months until, on February 28, 1996, Rodgers offered unconditionally to return to work. There is no evidence that Kitchens has done any hiring after Rodgers' offer. Neither Rodgers nor the Union ever filed any charges against Kitchens despite Rodgers' initial strike to protest Kitchens' discharge of employee New.

We conclude, in agreement with the Region, that further proceedings are not warranted because it is not clear that Rodgers was engaged in strikes over legitimate disputes with these employers, and because it would not effectuate the purposes and policies of the Act to proceed in the factual circumstances of these cases.

First, we note that the Board's recent decision to dismiss a similar allegation in DeMuth⁽³⁾ is closely analogous to the instant case. In DeMuth, the union referred member Price to a nonunion employer as an unpaid "salting agent," i.e., with the mission to organize employees. After Price had worked for one week, the union gave him a cap with a union logo and a tape recorder. The ALJ specifically found that Price intended to use these items to "bait" the employer into committing unfair labor practices. Id. at 938. In fact, shortly thereafter in a taped conversation between Price and the employer on the morning of September 20, the employer unlawfully interrogated Price, threatened him with discharge, and issued an overly broad no solicitation rule.⁽⁴⁾

Price then advised the employer that he was going out on strike. Price gave no reason for this action although the employer specifically asked him to do so. According to Price, he did not immediately go out on strike but instead worked four hours because he wanted to see if the employer would further harass or fire him after the taped "baiting" conversation.

The employer wrote Price a letter asking him "to please advise as to the reason you are on strike." Price did not respond to this request. Around three months later, Price wrote the employer that he was ending his strike and unconditionally offering to return to work. The employer's failure to reinstate Price as a returning unfair labor practice striker was alleged as unlawful.

The ALJ in DeMuth noted that shortly after Price had purported to go out on strike, he obtained other employment at substantially higher pay. The ALJ concluded that Price used the employer's unfair labor practices as an excuse to find a better paying job, and that Price had not gone out on strike but had "voluntarily quit":

He did not picket, he did not explain why he was on strike, he did not ask to negotiate differences and he did not contact Respondent for over 3 months. On the other hand, he did take full-time employment...at scale wages. Any objective view of his actions poststrike would lead one to believe that he had either voluntarily quit his employment...or had abandoned his strike, if he was in fact on strike.

I would have no hesitation in invoking the full range of remedies against [the employer] had he been given any opportunity by Price or the Union to rectify his mistaken actions of the morning of September 20 by giving him notice of the purpose of Price's "strike." Having refused to do so, I do not believe that Price and the Union are acting in good faith...nor do I believe that it effectuates the policies of the Act to accord Price the rights of an unreinstated unfair labor practice striker.

A majority of the Board panel adopted the ALJ's grounds for dismissal of the refusal to reinstate allegation.⁽⁵⁾

We conclude that further proceedings are unwarranted here in large measure because of the rationale of DeMuth. Here, as in that case, Rodgers engaged in a strike within days of being hired, and did not attempt to negotiate his alleged differences with the various employers, i.e., Rodgers did not provide them with any meaningful opportunity to address the bases for claimed reasons for going out on strike. Although Rodgers did engage in picketing, he did so for only an extremely brief period against South and ITS, and even then only after almost two weeks had passed after he had begun his alleged "strikes." In addition, Rodgers engaged in a clear pattern of repetitive strikes in purported protest of unfair labor practices, even though neither Rodgers nor the Union ever filed any charges against these unfair labor practices. These circumstances, which were absent in DeMuth, clearly suggest that Rodgers simply contrived the purported bases of his "strikes" and, as in DeMuth, was not engaged in any legitimate dispute with any of the above employers. Moreover, where in DeMuth organizer Price waited three months before offering unconditionally to return, Rodgers waited over 10 months to offer to return to South and five months to offer to return to the other employers. Finally, Rodgers offered to return to all three employers virtually simultaneously. This clearly

suggests that these offers, as well were not the result of a decision to abandon any kind of strike.

Accordingly, the Region should dismiss these charges, absent withdrawal.

B.J.K.

¹ The picket signs read "unfair labor strike against South AL Electric."

² The other individual allegedly had applied for work with ITS but had not been hired. The picket signs read "unfair labor practice against ITS."

³ DeMuth Electric, Inc., 316 NLRB 935 (1995).

⁴ Although the ALJ found these violations, he suggested that Price arguably could not have been coerced by the Employer's conduct since Price had intended to "bait" the Employer into committing unfair labor practices. The Board found it unnecessary to pass on that ALJ comment because "other employees were present during this conversation and....[the Employer's] coercive statements to Price interfered with their Sec. 7 rights in any event." Id at note 3.

⁵ Board Member Stephens adopted the dismissal of that allegation because "he agrees with the judge that Price's departure...was not a concerted action amounting to a strike [in part because] he took his actions against the wishes of the labor organization for which he had originally intended to organize." Id at note 2.